Enjo Contracting Co., Inc. d/b/a Enjo Architectural Millwork *and* New York District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO. Cases 29–CA–24260 and 29–CA–24370

December 31, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On January 15, 2002, Administrative Law Judge Jesse Kleiman issued the attached decision.* The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions except as explained below, and to adopt the recommended Order as modified and set forth in full below.

1. We agree with the judge, for the reasons he gives, that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Walter Clayton for his union activities.[2] As to the element of knowledge, the record supports the judge's findings that the Respondent's president knew of Clayton's union activity prior to his discharge.[3] Autovino was aware from the time of Clayton's job interview that Clayton was a longtime member of the Union. Indeed, during that interview, Autovino unlawfully interrogated Clayton about the Union and warned him not to discuss the union with other employees, in violation of Section 8(a)(1). Despite this warning, during most or all lunch and other breaktimes over his first week of employment, Clayton engaged in discussions with other employees about working conditions and the Union right outside the shop and at a nearby coffee shop where other employees regularly went for lunch. On the last workday before his discharge, he distributed union literature and his union business cards to several interested employees after work, while sitting in his car across the street from the shop. Such open union activity would be easily observable by the Respondent's supervisors and managers.

In addition, the judge credited the testimony of another employee, Matthew Dauchand, that right after Clayton's discharge Autovino was asked by employees why Clayton had been let go, and that Autovino, during the week after the discharge, held several meetings with employees, something the Respondent had not done in the past. As discussed below, Autovino raised the subject of the Union at these meetings and expressed his disapproval of it and of Clayton, telling employees not to speak with Clayton, implicitly confirming to them his knowledge of Clayton's organizing activities and that Clayton's discharge was connected to Clayton's organizing activity.[4]

2. We do not agree with the judge, however, that the Respondent also violated Section 8(a)(1) by threatening employees with layoffs or other unspecified reprisals if they supported the Union. As mentioned above, after Clayton's discharge, Autovino held several meetings with employees. According to employee Dauchaud's credited testimony, Autovino said at the first meeting that employees "should think twice about joining the Union, you know. Because the company isn't competitive." At the second meeting, Autovino again said employees "should really think . . . twice about getting into a union," because "at this point in time the union [isn't] really beneficial to the company," and "if the union get[s] in and start[s] to make demands, we wouldn't be able to compete with our competitors." The judge found Autovino's statement at the first meeting conveyed an unlawful threat of unspecified reprisals and the second

* We make the following editorial corrections in the judge's decision: on p. 4, L. 42, substitute ", then" for "than"; on p. 14, L. 36, substitute "decrease" for "decease"; on p. 15, L. 3, substitute "bidded" for "bided".

[1] The Respondent did not except to the judge's findings that it violated Sec. 8(a)(3) and (1) by granting employees additional benefits to discourage them from supporting the Union; and Sec. 8(a)(1) by interrogating Walter E. Clayton Jr. about his union background at his initial job interview and telling him not to discuss the Union with other employees, and by creating the impression of surveillance of protected employee activity. We shall include in the Order and notice remedial provisions omitted by the judge for the Respondent's unlawful direction to Clayton not to discuss the Union with other employees.

[2] The judge found that the antiunion animus of the Respondent's president, Joseph Autovino, was established by his unlawful interrogation of Clayton at his job interview; his order to Clayton at that time not to discuss the Union with other employees; the Respondent's failure to call as a witness the supervisor who could have testified as to Clayton's allegedly poor work performance; the timing of the discharge immediately after he had engaged in union activities; and the Respondent's shifting justifications for the discharge. The judge also found, and we agree, that the Respondent failed to show that Clayton would have been discharged absent his union activity.

[3] It is clear from the judge's discussion that he discredited Autovino's assertion that he did not learn of Clayton's union activity at the Respondent's workplace until after he had terminated Clayton.

[4] We also agree with the judge that the Respondent violated Sec. 8(a)(1) by telling its employees shortly after Clayton's discharge not to talk to Clayton in connection with his organizing efforts.

statement conveyed an unlawful threat of layoffs. We disagree as to both findings.

The Respondent's general statements that employees should "think twice" about joining the Union because the Respondent currently is not competitive are neither threats of reprisals nor of layoffs if employees opt for union representation. There is nothing inherently unlawful about an employer asking employees to consider the impact of unionization on the Company's poor competitive position. On the contrary, during a union organizational campaign, an employer has the right under Section 8(c) to convey to employees a view of its present economic situation and to ask them to consider whether union representation would improve or worsen that situation. That is exactly what the Respondent did here, without any suggestion that it would retaliate against employees if they chose union representation or that it would have to lay them off if the Union made demands.

The situation here is clearly distinguishable from the statements at issue in *Harrison Steel Castings Co.*, 293 NLRB 1158 (1989), review dismissed 923 F.2d 542 (7th Cir. 1990), upon which our dissenting colleague relies. The employer in that case stated in a newsletter to employees that "if we become union the Company may become non-competitive with a resulting loss of business and jobs." In the context of union animus demonstrated by contemporaneous unfair labor practices, the Board concluded that the above statement was coercive without the Respondent showing that the loss of jobs could come about through forces beyond the Respondent's control. The Board said:

> Without more specific, objective data, the statement in question could just as well be taken to suggest that the Respondent might, purportedly on the basis of cost factors that are at least partly within its own control and known only to it, discharge employees in the event they chose to be represented by a collective-bargaining representative. [293 NLRB at 1159.]

No such conclusion could reasonably be reached based on the Respondent's remarks here. The Respondent acknowledged that it was presently noncompetitive and, without expressly or implicitly predicting any adverse consequences, asked employees to take that factor into account in deciding whether they want a union to represent them and to bargain on their behalf.[5] Under these circumstances, even considering the context of the Respondent's other unfair labor practices, we find the General Counsel has failed to prove by a preponderance of the evidence that employees would reasonably regard Autovino's statements as threats of unspecified reprisals or layoffs for choosing union representation.

Our dissenting colleague argues that the Respondent's statement was a threat rather than a prediction under the standard set forth by the Supreme Court in *NLRB v. Gissel*, 395 U.S. 575, 618 (1969). However, as discussed above, the statement here was neither a threat, nor a prediction, of closure. It was simply a statement that acquiescence to union demands would hamper the Employer's ability to vie with competitors.

Our colleague argues that the fact of Clayton's discharge renders unlawful the statement about "think twice about joining the union." If the "think twice" statement had been linked to the discharge of Clayton, it could be argued that "think twice" meant "think twice lest you suffer the same fate as Clayton." However, the two were not linked. To the contrary, the statement linked "think twice" with the noncompetitiveness of the Company. Indeed, as the dissent acknowledges, the "think twice" statement was not even made at the meeting at which there was a reference to Clayton.

Our colleague then proceeds to attack the reference to being noncompetitive. She says that the statement threatens unspecified reprisals for supporting the Union. It does no such thing. It does not threaten, and it does not mention reprisals, specified or not. It simply makes the point that the Company is not competitive now, and the presence of a union would not help matters. This is not a *Gissel* situation. In that case, there was a statement that the plant could close, and the Court held that it was a threat, rather than a prediction. In the instant case, there is no statement about plant closure.

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[5] Thus, while, as our dissenting colleague notes, a statement that threatens unspecified reprisals may be unlawful, the Respondent's statement here, which contained no express or implicit prediction of adverse consequences whatsoever, does not constitute such a threat. Having distinguished *Harrison Steel Castings Co.*, supra, on the issue presented, we need not express any view whether the Board correctly decided the issue in that case. We note, however, that although the Seventh Circuit denied review of the Board's decision on procedural grounds, the court stated:

> It is far from clear that in the future, we would enforce a Board order predicated upon a finding that statements like the competitiveness comments at issue here are violative of Section 8 of the NLRA. While an employer may not threaten to cut jobs in retaliation for the success of a union in a representation election, "[t]o predict a[n][adverse economic] consequence that will occur no matter how well disposed the company is toward unions is not to threaten retaliation." *NLRB v. Village IX, Inc., d/b/a Shenanigans*, 723 F.2d 1360, 1367 (7th Cir. 1983). Statements that are "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control," *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), are not only permissible, but may be desirable, to the extent that they accurately educate employees as to the possible consequences of unionization. See generally *Shenanigans*, 723 F.2d at 1367–68. [923 F.2d at 547 fn. 4.]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Enjo Contracting Co., Inc. d/b/a Enjo Architectural Millwork, Staten Island, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging Walter E. Clayton Jr. and failing and refusing to reinstate him because of his activities on behalf of the Union.

(b) Granting its employees additional benefits, including vacation and medical benefits, in order to discourage its employees from joining, supporting, or assisting the Union, provided that the Respondent is not required to withdraw, vary, or abandon these benefits already granted to the employees.

(c) Interrogating job applicants about their union membership, activities, and sympathies.

(d) Directing job applicants to refrain from discussing the Union with other employees.

(e) Creating the impression among its employees that their union activities are under surveillance by the Respondent.

(f) Directing its employees to refrain from speaking to an agent of the Union.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Walter E. Clayton Jr. full reinstatement to his former position or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Walter E. Clayton Jr. whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against him, less interim earnings, plus interest, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Walter E. Clayton Jr. and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve, and within 14 days of a request, make available at a reasonable place designated by the Board or its agents for examination and copying, all payroll records social security payment records, timecards, personnel records and reports, and all other records including an electric copy of the records if stored in electronic form, necessary to analyze the amount of backpay under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Staten Island, New York, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 16, 2001.

(f) Within 14 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 31, 2003

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

Unlike the majority, I would find that Joseph Autovino, the Respondent's president, violated Section 8(a)(1) at his first meeting with employees by threatening the Respondent's employees with unspecified reprisals if they chose to be represented by the Union. The context of Autovino's remarks—Walter E. Clayton Jr.'s recent discharge and the Respondent's other violations of the Act that preceded and followed Autovino's remarks[1]—

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] My colleagues and I agree that the Respondent's discharge of Walter Clayton violated Sec. 8(a)(3) and (1), and that the Respondent also violated Sec. 8(a)(1) by directing employees to refrain from speaking

negates any attempt to portray as noncoercive his warning to employees to "think twice" about supporting the Union.

First, Autovino was asked by a number of employees why Clayton had been discharged. It is clear from the credited testimony that at least partly in response to those questions, Autovino took the unusual step of calling several employee meetings at which he expressed his strong opposition to employees associating with the Union. Specifically, at the first meeting,[2] Autovino said employees "should think twice about joining the Union, you know. Because the company isn't competitive." By making this statement at a meeting called almost immediately after Clayton had been discharged and employees had asked him the reason for the discharge, Autovino implicitly linked the discharge to Clayton's union activity, demonstrating both his knowledge of that activity and his antiunion animus. This linkage gave a clearly coercive edge to his admonition that employees should "think twice."[3]

In addition, Autovino's remarks must be analyzed in the context of the Respondent's other unlawful misconduct. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (assessment of the scope of protected employer expression "must be made in the context of its labor relations setting"). The backdrop to the meeting—the Clayton discharge itself and other repeated unlawful conduct—would surely have colored the way employees would construe Autovino's remarks, regardless of why the meeting was called. Because of that prior misconduct, employees would reasonably believe Autovino to be suggesting that they, like Clayton, would suffer economic consequences simply for choosing union representation.[4]

Finally, an employer's statement need not directly coerce employees in order to violate Section 8(a)(1); it is sufficient that the statement has a reasonable tendency to coerce.[5] Accordingly, when an employer informs employees of adverse consequences that could follow unionization, "the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. . . ."[6] An indication that a union victory, in and of itself, will adversely affect terms of employment or job security implies that the employer will retaliate against employees simply for choosing a bargaining representative.[7]

At the first meeting, Autovino offered no objective basis for linking "joining the union" directly to the Respondent's competitiveness; nor did he point to any "demonstrably probable consequences" of employees supporting the Union that were "beyond his control." Autovino clearly warned ("think twice") that unionization would lead to adverse economic consequences for employees ("the company isn't competitive"). The statement was therefore an implicit threat of—at a minimum—unspecified reprisals for supporting the Union. See *Harrison Steel*, 293 NLRB at 1159 (employer's suggestion that unionization could make it noncompetitive, leading to loss of business and jobs, had a tendency to coerce and was unlawful).

The majority attempts to distinguish *Harrison Steel* by noting that the employer there said that if the union were to win, it might become noncompetitive "with a resulting loss of business and jobs." But a statement can be unlawful whether or not the employer refers to specific consequences for employees. (This is precisely why the Board finds some warnings to be unlawful threats of *unspecified* reprisals.) As the Supreme Court explained in *Gissel*, supra, the issue is whether the employer is predicting adverse consequences within his control:

> If there is any implication that an employer may or may not take action solely on his own initiative for reasons

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with Clayton. In addition, the judge found numerous other violations of Sec. 8(a)(1), to which no exceptions have been filed: Autovino unlawfully interrogated Clayton about his union background before he was hired; unlawfully told Clayton not to discuss the Union with other employees; unlawfully created the impression of surveillance of protected employee activity; and after Clayton's discharge unlawfully solicited employees' complaints and granted additional benefits based on those complaints, in order to dissuade employees from supporting the Union.

[2] I need not reach the question whether Autovino's statements at the second meeting violated Sec. 8(a)(1).

[3] For this finding, contrary to the majority's characterization, I do not rely on Autovino's direct reference to Clayton's discharge at a different meeting.

[4] "In a case devoid of union animus or unlawful threats, an employer might suggest as a general economic proposition the bearing that the administrative costs of collective bargaining has on the price of the employer's product and, as a consequence, the possible change in the employer's competitive position in the market. But having manifested overt hostility to the union activists in its work force here . . . the Respondent could not lawfully go on to suggest the loss of jobs as a result of loss of business to the competition without demonstrating to employees that such a chain of causation would be brought about through forces beyond the Respondent's control." *Harrison Steel Castings Co.*, 293 NLRB 1158, 1159 (1989), review dismissed 923 F.2d 542 (7th Cir. 1990).

[5] See, e.g., *Eastern Omni Constructors, Inc. v. NLRB*, 170 F.3d 418, 423 (4th Cir. 1999); *Daikichi Sushi*, 335 NLRB 622, 623–624 (2001).

[6] *Gissel*, 395 U.S. at 618. See also *Tellepsen Pipeline Services*, 335 NLRB 1232, 1232 (2001), enfd. in relevant part 320 F.3d 554 (5th Cir. 2003); *Mohawk Bedding Co.*, 204 NLRB 277, 278 (1973).

[7] *Daikichi*, 335 NLRB at 623–624.

> unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion. . . . Conveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof.

395 U.S. at 618–619 (1969) (internal citation omitted).[8] And with respect to statements concerning the employer's competitiveness, an employer may not suggest that, quite apart from what the union might actually do, adverse consequences will result solely from unionization.[9] The Respondent made just such an unsupported suggestion here by linking its ability to compete directly to employees' support for the Union, rather than to any specific action the union might take or other economic development outside the Respondent's control.[10]

The majority also minimizes the coercive impact of the Respondent's statement at the first meeting by characterizing it as a mere request that employees "consider" the "impact of unionization on the company's poor competitive position," and "whether union representation would improve or worsen that situation." The Respondent's statement, however, did more than simply raise an innocent question of how the union might affect its economic condition. It distinctly, if unspecifically, suggested that unionization *would* have negative consequences for employees, regardless of other circumstances.[11] Having failed to provide an objective basis for this suggestion, and particularly in the light of its other violations, the Respondent violated Section 8(a)(1).

Dated, Washington, D.C. December 31, 2003

Wilma B. Liebman, Member

[8] My colleagues attempt to avoid *Gissel* by characterizing the statement at issue as "neither a threat, nor a prediction of closure," but "simply a statement that acquiescence to union *demands* [emphasis added] would hamper the employer's ability to vie with competitors." The statement at the first meeting, however, made no reference to "demands" of any nature.

[9] To the extent that the Seventh Circuit, in dismissing a review petition in *Harrison Steel*, indicated that linking adverse consequences solely with unionization would be lawful, I respectfully disagree. "[U]nder the law, union demands are never self-enforcing, but are always negotiable, and absent some proof, an employer has no basis for assuming that he will be forced by a union to act to his own certain detriment. To say or imply that the union will insist on certain intolerable work rules or working conditions, that the employer will be forced to accede to them even though he is in fact financially incapable of doing so, and that his accession will therefore force him out of business is to indulge in considerable speculation." *Paul Distributing Co.*, 264 NLRB 1378, 1383 (1982), citing *Gissel*, 395 U.S. at 619.

[10] Compare, *Golden Fan, Inc.*, 281 NLRB 226, 227 (1986) (restaurant employer's statements concerning competitiveness were not coercive because employer referred specifically and accurately to two other unionized restaurants that had closed and a third not doing well, and also said he did not know whether those competitors' problems were related to unionization, and did not indicate how unionization would affect its own facility).

[11] It is ironic that in finding this statement to be lawful, the majority relies on *Shenanigans*, supra.

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge and fail or refuse to reinstate employees because they joined, supported, or assisted the Union.

WE WILL NOT grant employees additional benefits, including vacation and medical benefits, in order to discourage employees from joining, supporting, or assisting the Union; however, we will not withdraw those benefits that we have already granted you.

WE WILL NOT coercively interrogate job applicants about their union membership, activities, or sympathies.

WE WILL NOT tell job applicants not to discuss the Union with other employees.

WE WILL NOT create the impression among our employees that your union activities are under surveillance.

WE WILL NOT tell our employees not to speak to an agent of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Walter E. Clayton Jr. full reinstatement to his former job or, if this position no longer exists, to a substantially equivalent position, without prejudice to his

seniority or any other rights or privileges he previously enjoyed.

WE WILL make Walter E. Clayton Jr. whole for any loss of earnings and other benefits resulting his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Walter E. Clayton Jr., and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that his discharge will not be used against him in any way.

ENJO CONTRACTING CO., INC. D/B/A ENJO ARCHITECTURAL MILLWORK

James Kearns, Esq., for the General Counsel.
Denise Forte, Esq. and *Scott P. Trivella, Esq. (Trivella, Forte & Smith, LLP)*, for the Respondent.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. On the basis of charges filed by New York District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO (the Union) in Cases 29–CA–24260 and 29–CA–24370 on May 22 and July 27, 2001, respectively, against Enjo Contracting Co., Inc. d/b/a Enjo Architectural Millwork (the Respondent), a consolidated complaint and notice of hearing was issued on July 31, 2001, alleging that the Respondent had violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). By answer timely filed the Respondent denied the material allegations in the consolidated complaint.

A hearing in this matter was held before me in Brooklyn, New York, on October 16 and 17, 2001. Subsequent to the closing of the case, the General Counsel and the Respondent filed briefs.

On the entire record and the briefs of the parties, and upon my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a domestic corporation, with its principal office and place of business located at 16 Park Avenue, Staten Island, New York (Staten Island facility), has been engaged in the manufacture of architectural woodwork, generally oak doors and mahogany windows and solid wood products. During the past year, which period is representative of its annual operations generally, the Respondent in the course and conduct of its business, purchased and received at its Staten Island facility, goods valued in excess of $50,000 directly from points located outside the State of New York. The consolidated complaint alleges, the Respondent admits, and I find that the Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find that Joseph Autovino, the Respondents' president, is an agent of the Respondent, acting on its behalf.

II. THE LABOR ORGANIZATION INVOLVED

The consolidated complaint alleges, the Respondent admits, and I find that the Union, at all material times, has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Evidence

1. The discharge of Walter E. Clayton Jr.

Walter E. Clayton Jr. (Clayton), a witness for the General Counsel, testified that since February 2001 he has worked for the Union as an organizer.[1] Clayton related his educational experience, apprenticeship with the Carpenter's Union, and as a "machine man" performing carpentry work using "various types of table saws, overhead rounders, shapers, edge banders, in-line borers, sanding machines," etc. In early April 2001, Clayton applied for a position with Enjo Architectural Co., Inc. He was asked to fax his resume to the Respondent, which he did, and a job interview was arranged.

Clayton met with Joseph Autovino, the Respondent's owner on April 10, 2001, at the Respondent's Staten Island facility. Clayton testified that after Autovino looked over his resume and asked him about what carpentry machines he could operate and about his previous work experience, Autovino said, "I notice here you worked for union shops."[2] Clayton stated that he answered, "I've been a member of the union, but when I'm out of work I have to eat, so I go wherever there's a job. Union or non-union, I work." Clayton related that towards the end of the interview, Autovino asked him, "Do you talk a lot?" and after Clayton responded that he might ask other employees for necessary materials, Autovino said, "Well, I don't want any talk of unions in my shop," because he noticed on my resume there was some union shops on there.[3] Clayton added that he told Autovino that he was going on vacation for 2 weeks and would be unable to start work until sometime in early May. Autovino told Clayton he would call him ending the interview.

Clayton testified that when he returned there were several calls from Autovino, "eager to hire me." After calling back, Clayton was hired to begin work on Monday May 7, 2001.

[1] As a union organizer, Clayton seeks employment with nonunion shops and then attempts to organize the employees. Prior to February 2001 Clayton was employed in various woodworking shops throughout the five boroughs of New York for the last 25 years. He has also been a member of the United Brotherhood of Carpenters and Joiners of America for that period of time.

[2] Clayton's resume does not list his employment as an organizer with the Union since February 2001. Clayton testified that Autovino had asked him, "[W]hat shop he was working in," and answered that he was not working in any shop at present. Clayton explained that he did not tell Autovino that he was then working as an organizer for the Union because he did not consider this as work in a carpentry shop experience. Autovino testified that he had asked Clayton if he was currently employed to which Clayton responded that he was unemployed.

[3] Clayton denied that Autovino had said, "I don't want you to talk about the union during off-hours." However, Autovino testified that there was no discussion about the Union at this interview at all.

While employees could start work at 6:30 or 7:30 a.m., they had to stay until 4:30 p.m. The Respondent employees about, 18–20 employees including Autovino and his two sons. William Colandrea is the plant manager and Krishna Sooknanan (Steve), the production manager.

Clayton testified that during his first week of employment he worked with a table saw, a crosscut saw, and portable routers, being assigned his work by Sooknanan. He stated that while he was asked if he could use a "Martin shaper" machine and Clayton answered yes, he was never given the opportunity to do so. Nor was he given the opportunity to work on any other type of machine, although asked if he could operate it.[4] Clayton stated that his assignments were to cut lumber to size, picking matching woods by color and veneers, and securing the correct and enough parts for the doors.

Clayton testified that also during his first week of work he discussed with the other employees their working conditions, and towards the end of the week, he started talking to some of the other employees about the Union. This occurred during nonworking hours, off the premises, and outside the shop, during morning coffeebreak (9:15–9:30 a.m.), lunchtime, and after work.[5] Clayton stated that on Friday of that week (May 11th), during lunch, employees were complaining about pay, benefits, holidays, and vacations. Clayton told them, "Well, when I worked with the union we had this, we had that . . . ." Clayton related that at first he spoke to one employee than to others as they came over to a total of four employees. He added that at the end of the workday, across the street from the shop, while sitting in his car, he distributed some union literature to about three or four interested employees and told them he was an organizer for the Union and was there to help them and gave them his union business card.

Clayton testified that on that same Friday when receiving his paycheck, Autovino shook his hand and told him, "[H]e was doing fine, his work was good, I have no complaints." Clayton related that Steve, the production manager, had asked him to work the next day Saturday, there was a lot of overtime work, but Clayton had prior commitments and could not work that Saturday.

Clayton reported for work on Monday morning, May 14. Clayton testified that he spoke to other employees about the Union, "more intense discussions," outside the building during breaktime. Clayton again told them that he was a union organizer there to help them because they were complaining about their wages and that they could organize and "get a majority of the men to sign authorization cards." He said that the boss could not fire them for talking to him and distributed and explained the union literature to them. Clayton stated that while he spoke to employees on a basis of one to one, to a total of "eight different guys" this was done to avoid "you don't want to see guys in a huddle."

Clayton testified that at the end of the day on that Monday, he was notified that his son had gotten into trouble at school and that Clayton had to meet with the dean on Tuesday, May 15. Clayton told Colandrea about this stating, "I told him that I had to go to the kid's school. I didn't know how long it was going to be, but most likely—for me to come from my son's school back to Staten Island, I would never have made it in time. So I said, "Most likely I'm taking the whole day off." According to Clayton, Colandrea responded, "Oh, I understand. I have kids" or "Don't worry about it. We all have kids. Good luck." Clayton denied that he had told Colandrea that he would be in later that afternoon on May 15. Clayton agreed that he did not call in on Tuesday, May 15, to say he would not be in during the remainder of the day.

On Wednesday, May 16, Clayton reported for work and Autovino met him at the office and told him he was discharged. Clayton asked him why, and Autovino told him that, "a couple of jobs that we were counting on, we didn't receive, so I have to let you go. I don't have the work." Clayton asked Autovino if his termination had something to do with his work and Autovino said, "No, your work is fine, your work was very good, you're a good worker." If we pick up, "I'll give you a call."

Clayton testified that he then left the Respondent's premises and sat in his car near the office. Thereafter, Autovino and his son came out and asked Clayton what he was still doing there. Clayton said he was trying to get his wife on the phone. Clayton continued that it was still early in the morning and as employees were showing up for work, he started talking to them before they entered the Respondent's facility and told them what had happened and "started getting authorization cards signed right then and there from some of the guys." Clayton testified that he then moved his car near the coffee shop and spoke to other employees when they took their coffeebreak, getting another authorization card signed.

Clayton testified that at one point, Steve came out of the shop to go for coffee and he asked Clayton how he had made out with his son and Clayton said fine and asked Steve what was going on inside the plant. Clayton stated that Steve responded, "Oh, the boss is going crazy." Clayton then asked Steve what he meant by this and Steve "changed the subject. Right away, he changed the subject."

Clayton testified that he waited until the lunch period and spoke to a dozen of the employees in the coffee shop when Colandrea came in and joined the conversation asking questions about how many "guys were out of work with the Carpenter's Union." Clayton admitted that neither Colandrea nor Steve observed him getting signed authorization cards. Clayton stated that Steve gave him his work assignments, as did Colandrea and that both Steve and Colandrea coordinated the work in the shop. Clayton added that when he was terminated he still had a lot of work left to perform.

[4] Clayton denied that he had ever used or been asked to use a "Pisoric saw," used to cut picture frames, while employed by the Respondent. While Clayton also said that he had previously used a "freehand shaper," but had never been asked to do so at the Respondent's plant, he denied that he had ever told the Respondent that he felt uncomfortable using this equipment. William Colandrea testified that he had never asked Clayton to work on any other machine besides a table saw.

[5] There is a morning coffeebreak and a lunchbreak at 12:30 to 1 p.m. Clayton testified that some employees "would leave the building and go down to the coffee shop around the corner and then come back." At lunchtime some employees would sit in their cars, others would eat in the coffee shop back room.

Matthew Dauchand (Dauchand), another of the General Counsel's witnesses, testified that he worked for the Respondent as a porter than as an assistant tradesman from November 2000 to May 23, 2001. Dauchand stated that he had several conversations with Clayton, when Clayton became, employed by the Respondent on May 7, 2001. While they also discussed work, politics, sports, and economics, they also had conversations about working conditions in the shop and Clayton spoke about the Union and that "it was beneficial to all involved in it," and also that the employees should get organized. Dauchand stated that Clayton distributed literature about the Union and spoke to the employees as to how they could organize. Danchand related that Clayton spoke to him about the Union during a break period outside the Respondent's facility, and distributed the union literature "over at the coffee shop."

As its witness, the Respondent called Joseph Autovino, the Respondent's president, who testified that about 3 or 4 years ago the Respondent engaged in a renovation of its main facility adding two new wings. A year and a half ago, wiring was installed for a security system, basically alarms, and security cameras, etc. While the wiring for this system was being installed prior to the hiring of Clayton, the surveillance camera systems "were being worked on around May 2001.

Autovino testified that upon the basis of a resume sent in by Walter E. Clayton Jr., he arranged an interview and met with Clayton in May 2001 and reviewed Clayton's resume with him. Autovino asked Clayton if he was currently employed since Clayton's resume listed job employment to February 2001. Clayton responded that he was not then employed.[6] Autovino stated that while he noticed on Clayton's resume that he had "experience" with the District Council, and that he may have commented about Clayton having worked for union contractors, "It did not effect me one way or the other. I was just looking for a qualified employee." According to Autovino, he and Clayton went over Clayton's work experience, including that Clayton could use shapers and other pieces of equipment except molders. Autovino related that he had been looking for a worker who was comfortable using various types of equipment and had "flexibility with different types of machinery."

Autovino denied saying anything during the interview about the Union or that he did not want any talk about the Union in his shop. Autovino testified that Clayton worked for the Respondent for 5 or 6 days starting on a Monday. Autovino stated that he had "minimal" contact with Clayton concerning his work other than to observe that Clayton came in to work on time, mostly worked on the table saw, "but my understanding is that he was asked to work on the shaper and other equipment. He was not comfortable working on it." Autovino related that Steve, the production manager,[7] had told him at the end of the first week that Clayton was not comfortable working on the shaper and that his main experience was on the table saw, which he was good at, therefore, he was assigned to work on that piece of equipment. Autovino added, "Basically, we do not let anyone work on any piece of equipment, especially if they are new, if they feel they are not comfortable, again, because I am afraid they would get injured."

Autovino testified that the "main factor" in deciding to terminate William Clayton, "was the fact that he did not show up for work on one day when he said he was going to be in a little late and did not show up at all. . . . I think it was the 14th, May 14th. It was a Tuesday, I believe." Autovino stated that upon observing that Clayton was not at work he asked William Colandrea, the plant manager, about this and Colandrea told him that Clayton had advised him the previous day that he was going to come in late since he had a problem with his kid in school "or something like that." Autovino related that when Clayton failed to show up for work that day "I was a little annoyed to say the least." Autovino continued that Clayton neither called him or Colandrea or anyone else to tell them that he was not going to be in later that day. Autovino added that the Respondent has a strict policy about employees not calling in to report their absence and he is adamant about this since it disrupts the other employees work.

Autovino testified that another factor in his determination to fire Clayton was his "basic overall performance. . . . He did not live up to my expectations . . . for twenty-five years experience, that he would be a cracker jack. That he would be able to work all of the machines and he was not."[8] Autovino continued, and "the third issue, not necessarily in that order . . . was the fact that I did bid on three very large jobs," and the Respondent received none of them. He stated, "At that point I really did not have any additional work that would warrant me keeping Mr. Clayton."

Autovino related that the three substantial jobs the Respondent had counted on for additional work were: Hird Baker; Shroid General Contractors; and Precision Window Systems. The bids for these jobs had been submitted in late February and early April 2001, respectively. Autovino testified that while the Precision Window Systems contract for school windows ($1,400,000) went to Artistic Woodworking of New Jersey, a company owned by Autovino's brother, the Respondent received approximately half of that work since the job was too big for Artistic Woodworking to handle alone. However, Autovino stated that he received notice of this additional work after the decision to terminate Clayton had been made. Autovino added that after the Respondent received notice that it had lost the three job bids in mid-May 2001, and Clayton was then terminated, the Respondent's business "had slowed down slightly but nothing major." Moreover while the employees continued to work overtime as previously, it was less than they had before. Autovino also testified that since Clayton's discharge, the Respondent has hired no new employees.

Autovino testified that when he terminated William Clayton on Wednesday, May 16, 2001, he told him, "I am sorry . . . I have to let you go." Autovino told him that he felt bad that he was letting Clayton go because he was a good worker, and it was only because he had failed to receive the three jobs the Respondent had bid on and the Respondent had no position for

[6] Clayton failed to tell Autovino that he was then employed as an organizer for the Union since February 2001. Also see fn. 2 herein.

[7] Krishna Sooknanan (Steve) was not called as a witness to testify herein.

[8] Autovino testified that it was Steve who reported to him about Clayton's work performance and skills.

him. Clayton asked if it was because of his work and Autovino stated, "When I am firing someone or letting somebody go I do not get into you are not really good. . . . I do not feel it is really necessary. So I said that everything was fine. It was just the fact that I lost the jobs and I really do not have any work and I have to keep the work for my regular employees. Since you are the last one on, we have to let you go." Autovino admitted that he told Clayton that when things pick up again he would give him a call back to work. Autovino denied that when he notified Clayton of his termination that he knew he was employed by the Union or that Clayton was attempting to organize his shop or was speaking to the other employees about the Union. Autovino stated that he first learned that Clayton was affiliated with the Union when on the day of Clayton's termination, towards the end of the day he observed Clayton outside the shop "giving out pamphlets" and there was a union sign on the side of his car.[9]

William Colandrea, a witness for the Respondent, testified that as plant manager, he "basically controls the shop, directing all the employees, job tasks, duties, overtime,[10] discipline on a minor note, basically, job assignments." Colandrea stated that he only actually worked with William Clayton for 1 day, Monday, May 14, 2001. Colandrea continued that about 2 or 3 in the afternoon Clayton told him that he had to bring his son to school because of a problem "then he would be at work. . . . I will be in late." Colandrea replied that it was "Okay, I had no problem with that." Colandrea related that he was "short" of employees and "It was better late than never, you know." However, he denied saying, "[W]e all have children." Colandrea added that he has no children.

Colandrea related that on the morning of May 15, Autovino observing Clayton's absence asked him where Clayton was. Colandrea stated that he explained to Autovino that Clayton "had something to do with his son for school in the morning and he would just be in a little later."[11] Clayton did not return to work that day nor call in. Colandrea related that at two in the afternoon he and Autovino discussed Clayton's failure to show up. Colandrea testified, "Well, basically, we were looking for a different caliber of person, more reliable, nothing more than that." Colandrea added that Clayton's failure to appear on May 15 resulted in a lot of Clayton's work remaining uncompleted, "to be completed a whole day later or by somebody else." Colandrea testified that on Wednesday, May 16, Autovino told him that he had terminated Clayton because Clayton was not "versatile enough in the shop, only being a table saw man. And the fact that he was unreliable, he left me hanging that day."

[9] Autovino testified that soon after terminating Clayton and Clayton had left the shop, he noticed Clayton sitting in his car across the street and he and his son John approached Clayton who told them he was waiting for his wife to call back. Nothing else was said.

[10] Colandrea testified that during mid-May 2001 there was no change in the amount of overtime. In July it slowed down.

[11] Colandrea denied that Clayton had told him that he would not be in on May 15 or about where Clayton lived and the school in relation to the Respondent's facility.

2. The meetings with employees

Dauchand testified that after Walter Clayton was terminated "inquiries" were made among the Respondent's employees as to why he was terminated. The Respondent then instituted a series of meetings, three of which he attended between "roughly" May 20 and 23, 2001, with all its employees except those involved with administration.[12] The first meeting was held on a Monday or Tuesday between Clayton's termination on May 16, 2001, and Dauchand's discharge on May 24, 2001, near the shaper machine in the shop. Dauchand stated that Autovino started the meeting saying:

> Speaking about us at Enjo, our working conditions and his trying to improve conditions and so on. Then there was talk about the union, and we should think twice about joining the union, you know. Because the company isn't competitive. . . . Go ahead and speak about what are our grievances, what are the problems we're having.

Dauchand added that several employees raised issues regarding vacation benefits, medical benefits, "heightened security . . . because there were a lot of cameras being placed at that point in time. You know, making the company more competitive, about incentives, about motivational things." According to Dauchand, Autovino's response was, "[Y]es, he would listen to everything and he'll get back to us later."

Dauchand testified that a second meeting occurred later on that week. Autovino commenced the meeting talking about "his making strides to improve the shop" and there were rumors about the Union and the employees should discuss this, "Because getting involved in a union is not a good thing, because most of the time the union don't look after most of their guys. . . . He said that we should really think . . . twice about getting into a union. Because at this point in time the union wasn't really beneficial to the company. You know, if the union get in and start to make demands, we wouldn't be able to compete with our competitors."[13] Dauchand stated that Autovino again asked the employees what their grievances were, and "the problems the workers are having. Dauchand related that the employees spoke about vacation and medical coverage concerns, and incentives to motivate them "to make us competitive, to compete with these companies." Autovino again said he would get back to the employees.

Dauchand testified that at a third meeting he attended the following week, Autovino presented the employees with a document, "Clarification and Addendum to Company Policy May 23, 2001." It listed "Improved Medical Benefits," and better

[12] Dauchand seemed unsure as to the actual dates of these meetings. Autovino testified that he held two meetings with employees.

[13] Dauchand at first could not recall if Autovino discussed Walter Clayton at any of the meetings. However, after his recollection was refreshed, by viewing an affidavit he previously gave to a Board agent, he remembered that at the second meeting Autovino told the employees that he had seen "the new guy, Walter Clayton outside. And we should watch how we speak about the union, because getting into the union is not a good thing at this point in time. . . . I want to be competitive, and should the union get in the company wouldn't be able to compete." Dauchand added that Autovino also said that, "we shouldn't be speaking to Mr. Clayton."

vacation, sick/personal, and holiday pay. Dauchand stated that Autovino said, "Do you all agree now it's a good policy, and you don't have to go to the union." Autovino then went around shaking hands with the employees but Dauchand refused to shake his hand.

The evidence shows that Dauchand was terminated on May 24, 2001, by Autovino. Dauchand had clocked out for lunch the previous day May 23 and failed to return to work that afternoon. When Dauchand appeared for work on the morning of May 24, 2001, Colandrea asked him why he hadn't returned to work after lunch on May 23. Dauchand responded, "I needed more time to think." Dauchand stated that Colandrea told him, "Well, you guys have been acting strange ever since that new guy showed up here and have been hanging around the building." Dauchand then spoke to Autovino who told him that his "probationary" period was over and he was terminated. Dauchand added that when Colandrea referred to "that new guy," he knew the reference was to Walter Clayton.

Regarding the meetings with employees, Autovino testified that because some of his employees had come up to him on several occasions and wanted to talk to him, "I realized that, obviously there is something going on. Let me have a meeting with everyone rather than have an individual contact." Autovino stated that there were two meetings both held in the shop with all the employees, approximately 18, present except the office personnel. The first meeting occurred on May 21, 2001, and lasted about a half hour. Autovino asked, the employees about the issues they wanted to discuss. The employees spoke about the lack of a prescription plan and wanted this added to their medical coverage, and their need for an additional week vacation after 5 years of employment. Autovino told the employees, "Okay, I will take it into consideration and I will get back to you." Autovino denied saying anything at this meeting about Walter Clayton nor did he tell the employees that they better not talk to Clayton. While Autovino related that the "only thing I mentioned about the union was the fact that I said to just be careful what you are getting into. Make the right decision";[14] he also denied ever telling his employees not to join the Union or threaten employees if they did join the Union.

According to Autovino a second meeting with employees took, place on May 23, 2001, in the shop with the same employees being present. Autovino testified that, "basically, I conceded. I agreed with what they wanted. I gave them a listing of the added benefits, the five-year addition weeks vacation and the prescription plan on the medical." Autovino stated that the Respondent already provides a 401(k) plan established in January 2000, a profit-sharing plan since January 2000, medical and vacation benefits for employees started "ten or fifteen years ago," and holiday and sick days "that has always been."

[14] Autovino also testified that at one of the two meetings when he made this statement to employees it was, "Because it got back to me, okay, that the union was offering them all sorts of ideas and so on. I just said just to be careful. . . . Make the correct decision." He continued that, "[a]t that point it was known that there was a union involved and they were promising a lot of things. I was just saying to just be careful." Autovino now testified that this happened at the second not the first meeting as he had initially testified. Autovino stated, that he first learned that there were discussions about the Union among his employees after Clayton was terminated.

3. Credibility

As to the credibility of the respective parties' witnesses, after carefully considering the record evidence, I have based my findings on my observation of the demeanor of the witnesses, the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole. *American Tissue Corp.*, 336 NLRB 435 (2001); *New York University Medical Center*, 324 NLRB 887 (1997); *Gold Standard Enterprises*, 259 NLRB 618 (1978); *V & W Castings*, 231 NLRB 912 (1977); and *Northridge Knitting Mills*, 223 NLRB 230 (1976). I credit the testimony of the General Counsel's witnesses, William Clayton Jr. and Matthew Dauchand.[15] Their testimony was given in a forthright manner, generally consistent and corroborative of each other, and consistent with other believable evidence in the record. Moreover, some of their testimony of consequence was actually corroborated by that of the Respondent's own main witness, Joseph Autovino. Further, based upon their demeanor and other facts in the record I found them to be more trustworthy as witnesses.

This is not to say that I discredit all of the testimony of the Respondent's witnesses where it does not conflict with that of the General Counsel's witnesses.[16] However, I found that the testimony of these witnesses, especially that of Autovino was not supported by the evidence in the record on critical issues. Of additional significance is the failure of the Respondent to call Krishna Sooknanan (Steve) as a witness without explanation to corroborative, clarify, or rebut any of the testimony given. Since his testimony of some importance was not elicited, it is presumed that it would not have supported the contention of the Respondent.[17]

B. Analysis and Conclusions

The consolidated complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging its employee Walter E. Clayton Jr. because he joined, supported, or

[15] While Dauchand at times seemed confused as to dates with some inconsistencies, noted, despite this it appeared to me that he was attempting to relate truthfully and as accurately as to what actually occurred as he remembered these events.

[16] It is not unusual that based upon the evidence in the record, the testimony of a witness may be credited in part, while other segments thereof are discounted or disbelieved. *Jefferson National Bank*, 240 NLRB 1057 (1979), and cases cited therein.

[17] An adverse inference may properly be drawn regarding any matter about which a witness is likely to have knowledge, if a party fails to call that witness to support its position and the witness may reasonably be assumed to be favorably disposed to the party. *Hudson Moving & Storage Co.*, 322 NLRB 1028 (1997); *Redwood Empire*, 296 NLRB 369, 384 fn. 83 (1988). Contrast, *Goldsmith Motors Corp.*, 310 NLRB 1279 fn. 1 (1993); *Property Resources Corp.*, 285 NLRB 1105 fn. 2 (1987) enfd. 863 F.2d 964 (D.C. Cir. 1988).

Also, from the failure of a party to produce material witnesses or relevant evidence without satisfactory explanation, the trier of the facts may draw an inference that such testimony or evidence would be unfavorable to that party. *7-Eleven Food Store*, 257 NLRB 108 (1981); *Publishers Printing Co.*, 233 NLRB 1070 (1977).

assisted the Union and in order to discourage its employees from engaging in such activities, or other concerted activities. The Respondent denies this allegation.

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Under the test announced in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d (899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved by the Supreme Court in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), a discharge is violative of the Act only if the employee's protected conduct is a substantial or motivating factor for the employer's action. If the General Counsel carries his burden of persuading that the employer acted out of antiunion animus, the burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Office of Workers Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994); *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334 (D.C. Cir. 1995); *Manno Electric*, 321 NLRB 278 fn. 12 (1996); *Wright Line*, supra. Also see *J. Huizinga Cartage Co. v. NLRB*, 941 F.2d 616 (7th Cir. 1991).[18] However, when an employer's motives for its actions are found to be false, the circumstances may warrant an inference that the true motivation is an unlawful one that the employer desires to conceal. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966); *Limestone Apparel Corp.*, 255 NLRB 722 (1981); *Golden Flake Snack Foods*, 297 NLRB 594 fn. 2 (1990). See also *Peter Vitale Co.*, 313 NLRB 970 (1994). The motive may be inferred from the total circumstances proved. Moreover, the Board may properly look to circumstantial evidence in determining whether the employer's actions were illegally motivated. *Associacion Hospital del Maestro*, 291 NLRB 198 (1988); *White-Evans Services Co*., 285 NLRB 81 (1987); *NLRB v. O'Hare-Midway Limousine Service*, 924 F.2d 692 (7th Cir. 1991). That finding may be based on the Board's review of the record as a whole. *ACTV Industries*, 277 NLRB 356 (1985); *Health International*, 196 NLRB 318 (1972).

In carrying its burden of persuasion under the first part of the *Wright Line* test the Board requires the General Counsel first to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. *Manno Electric, Inc.*, supra at 280 fn. 12. *Wright Line*, supra. In establishing unlawful motivation, the General Counsel must prove not only that the employer knew of the employees union activities or sympathies, but also that the timing of the alleged reprisals was proximate to the protected activities and that there was antiunion animus to "link the factors of timing and knowledge to the improper motivation." *Hal Construction v. NLRB*, 941 F.2d 684 (8th Cir. 1991); *Service Employees Local 434-B*, 316 NLRB 1059 (1995).

From all of the above, I am persuaded that the General Counsel has established that a motivating factor in the discharge of Walter Clayton was his protected activities based on the abundant evidence of animus toward the Union, other unlawful consequences imposed by the Respondent on Clayton because of his union activities, and the timing of the Respondent's actions relative to Clayton's protected activity. Accordingly, the burden shifts to the Respondent to establish that it would have terminated Walter Clayton even in the absence of his protected concerted activities. *Office of Workers' Compensation Programs v. Greenwich Collieries*, supra; *Wright Line*, supra. Also see *Downtown Toyota*, 276 NLRB 999, 1014 (1985).

From the evidence herein, I find that the Respondent has failed to meet its burden of persuading that it would have taken the same action against Walter Clayton even if he had not engaged in protected activity.[19]

According to Clayton's credited testimony, during his job interview Autovino noticed from Clayton's resume that he had "worked for union shops" and asked him about this. After Clayton answered that he was a member of the Union and had sought work in both union and nonunion shops, Autovino told Clayton at the end of the job interview, "Well, I don't want any talk of union in my shop."[20]

The consolidated complaint alleges that the Respondent violated Section 8(a)(1) of the Act by interrogating a job applicant about his union membership, activities and sympathies and by directing a job applicant to refrain from discussing the Union with other employees. The Respondent denies these allegations.

The Board in *Blue Flash Express, Inc.*, 109 NLRB 591 (1954), set forth the basic test for evaluating whether interrogations violate the Act, whether under all the circumstances the interrogation reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act. This longstanding test was reiterated in *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). In *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985), the Board stated:

> The Board in Rossmore House outlined some areas of inquiry that may be considered in applying the Blue Flash test, stressing that these other relevant factors were not to be mechanically applied in each case. Thus, the Board mentioned the background the nature of the information sought, the identity of the questioner, and the place and method of interrogation.

Evidence of actual coercion is not necessary and in determining whether the conduct tends to be coercive, an objective standard

[18] An employer simply cannot present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct *T & J Trucking Co.*, 316 NLRB 771 (1995)*; GSX Corp. v. NLRB*, 918 F.2d 1351 (8th Cir. 1990).

[19] *Office Workers Compensation Programs v. Greenwich Colleries*, supra; *Manno Electric*, supra; and *Wright Line*, supra.

[20] The Respondent points to Clayton's failure to tell Autovino, at the time that, he was then employed by the Union, as an organizer. Clayton gave as the reason for his answer to Autovino that he was unemployed that he was only relating his carpentry shop experience as being relevant, at the time and therefore was not lying to the Respondent. Moreover, the Board has long recognized that, under the totality of the circumstances test, an applicant during a job interview, may understandably fear that any answer he might give to questions about union sentiments may well affect his job prospects. See *Lassen Community Hospital*, 278 NLRB 370, 374 (1986).

is applied. The Board considers all the surrounding circumstances and in addition to the above criteria other relevant factors such as, whether the interrogation was aimed at the employee, whether the employer displayed antiunion animus, whether the interrogation had any lawful purpose. *Sunnyvale Medical Clinic*, supra. The words themselves, or the context in which they were used, must suggest an element of restraint, coercion, or interference.

The totality of the circumstances herein establishes that the Respondent, by Joseph Autovino, unlawfully interrogated William Clayton a job applicant about his union membership, activities and sympathies. Here, the questioning of Clayton about his union activities came from the Respondent's owner and president, at Clayton's job interview.[21] Moreover, Autovino's questioning of Clayton about the union shops he had worked at had no valid purpose other than to unlawfully interrogate Clayton about his union sentiment, which relates directly to his protected activity and seeks to elicit the precise type of information that employees are privileged to keep from their employers.[22]

Therefore, from all of the above, I find and conclude that the Respondent unlawfully interrogated Clayton, a job applicant, about his union membership, activities, and sympathies, in violation of Section 8(a)(1) of the Act.[23]

Additionally, when Autovino also directed Clayton to refrain from discussing the Union with other employees the Respondent violated Section 8(a)(1) of the Act.[24]

Aside from Autovino learning that Clayton was a union member and had worked for union shops at the job interview, Clayton testified that during his first week at work he listened to the employees discussions of working conditions. At the end of the week, on Friday, May 11, he spoke to individual employees to a total of four about the Union during nonworking hours off the premises and outside the shop, during a lunchbreak. After work on Friday from his car, he also distributed union literature to three–four interested employees and told them he was an organizer for the Union.

On Monday, May 14, Clayton had "more intense discussions" with about eight employees, although individually, about the Union, this occurring outside the Respondent's facility during breaktime. He told them about their rights, that he was a union organizer and distributed and explained the union literature.[25] On Wednesday, May 16, when Clayton reported for work, Autovino told him he was terminated because the Respondent had failed to receive any of the jobs it had bid on and although Clayton's work was "fine," and he was a "good worker" the Respondent didn't have the work sufficient to keep Clayton on. Autovino also said that should things pick up he would call Clayton back to work.

The unlawful interrogation of Clayton at his job interview, the unlawful direction to him not to discuss the Union with other employees as evidence of animus, the timing of his discharge immediately after he engaged in union organizing activities[26] the Respondent's animus demonstrated after Clayton's discharge, as well be discussed hereinafter, and the pretextual and shifting reasons advanced by the Respondent for his termination all establish the illegal motivation for Clayton's discharge. The General Counsel having established a prima facie showing sufficient to support the inference that Walter Clayton's discharge violated Section 8(a)(3) of the Act, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of the employees' protected union activity.[27]

The Respondent has failed to meet its substantial burden of proving that it would have fired Clayton absent his protected union activities. The Board has held that when an employer vacillates in offering a rationale and consistent explanation for its actions, an inference is warranted that the real reason for such action is not among those asserted and is an unlawful one.[28] Shifting and piled on defenses, such as those proffered by the Respondent, compel the inference that the Respondent's defense is a pretext.[29] Additionally, Board law holds that where an employer offers shifting defenses, it must provide

[21] The Respondent knew of the union background of Walter Clayton. The interrogation of Clayton during his job interview shows that the Respondent was concerned about his union background and about unionization in general. *Active Transportation*, 296 NLRB 431, 432 (1989).

[22] *Royal Manor Convalescent Hospital*, 322 NLRB 354, 362 (1996); *Advance Waste Systems*, 306 NLRB 1020 (1992); *Club Monte Carlo Corp*., 280 NLRB 257 (1986), enfd. 821 F.2d 354 (6th Cir. 1987).

[23] *Rossmore House*, supra; *Sunnydale Medical Clinic*, supra; *DeJana Industries*, 305 NLRB 845 (1991); *Common Industries*, 291 NLRB 632 (1988); and *Penny Supply, Inc*., 295 NLRB 324 (1989).

[24] *Express Messenger Systems*, 301 NLRB 651 (1991); *Pioneer Natural Gas Co*., 253 NLRB 17 (1980); *El Gra Combo*, 284 NLRB 1115 (1987), affd. 853 F.2d 996 (1st Cir. 1988); *Scientific Atlanta*, 273 NLRB 622 (1986); *General Motors Corp*., 239 LRB 34 (1978). Moreover, this would negate any reference sought by the Respondent that since it was aware of Clayton's union background and hired him despite this, the Respondent could not have discharged him for his union activities.

[25] From Clayton's own testimony that on Friday, May 11, when he received his paycheck Autovino complimented his work and Steve offered him the opportunity to work on Saturday, it appears that the Respondent was unsure at that time that Clayton was a union organizer or "salt," organizing its employees. It may have learned about Clayton's union activities on Friday, May 11, or Monday, May 14. Moreover, while the Respondent may argue that it hired Clayton despite being aware that he had worked for union shops and was a member of the Union, thus dispelling the conclusion that his termination was because of his union activities and sympathies, it should be remembered that Clayton was directed not to talk to the other employees about the Union, and it is apparent that the Respondent felt it needed a qualified carpenter employee in the event it obtained any of the substantial bidded jobs.

[26] See *Cell Agricultural Mfg. Co*., 311 NLRB 1228 (1993) (timing alone, even without any other evidence of unlawful conduct or animus, held sufficient to suggest anti-union animus as a motivating factor in the employers actions). *NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984).

[27] *Wright Line*, supra.

[28] *Johnson Freightlines*, 323 NLRB 1213, 1222 (1997); *Elliott Square Court Corp*., 320 NLRB 762 (1996); *Robin Transportation Ltd*., 310 NLRB 411, 417 (1993); and *Kenrich Petrochemicals*, 294 NLRB 519, 533 (1989).

[29] *Johnson Freigtlines*, 323 NLRB at 1221; *C. J. Rogers Transfer*, 300 NLRB 1095, (1990). As stated in *Johnson Freightlines*, supra at 1222, "when a party's story keeps changing, it is perfectly appropriate for the finder of fact to conclude that none of the versions are true."

substantial and convincing evidence to dispel doubt, or it is fatal to its defense.[30]

According to the Respondent, Clayton was terminated because of three reasons: (1) Clayton failed to show up for work when he told a Supervisor William Colandrea that he would be late that day; (2) Clayton's overall performance "did not live up to Autovino's expectations given Clayton's alleged twenty-five years experience;" and (3) the Respondent failed to receive any of the substantial jobs it had bid on in the beginning of 2001.[31]

It is undisputed that Clayton failed to report for work on Tuesday, May 15, 2001. Clayton credibly testified that he had told Plant Manager William Colandrea before leaving work on Monday, May 14, that he had to go to his son's school the following day and that, "Most likely I'm taking the whole day off."[32] Colandrea testified that he understood and granted Clayton permission to do so. However, Colandrea also testified that Clayton had said he would be in late on Tuesday, May 15, and not out for the entire day. As indicated hereinbefore, I credit Clayton's testimony that he had permission to be absent on May 15. It seems illogical that Clayton would have obtained Colandrea's consent to be away from work for only part of the day and then taken the whole day off without authorization especially having just obtained this job.[33] It is also interesting to note that Colandrea and Autovino asserted that they were unhappy because Clayton did not report for work that afternoon because there was a lot of work left for Clayton to do. This is contrary to the Respondent's other asserted reason for the termination of Clayton that of there being a lack of work.

The Respondent also failed to demonstrate that Clayton's overall performance "did not live up to Mr. Autovino's expectations given Clayton's alleged twenty-five years experience," and that he was discharged for insufficient skills and because he could only operate a table saw. In Clayton's short tenure of employment with the Respondent he was assigned to work a table saw, crosscut saw and router, and although asked if he could operate other pieces of equipment, he was never given the opportunity to do so. While the Respondent alleges that Clayton had begged off using the other pieces of equipment as being not "comfortable" in their use, the Production Manager Krishna Sooknanan who made the observations about Clayton's skills and actually assigned him his work, was not called as a witness by the Respondent to support this.[34] Moreover, the Respondent offered no evidence as to any specific refusal by Clayton to perform an assignment or that he had improperly used any equipment. Additionally, Clayton's 25 years of carpentry experience and formal training, his having worked in woodworking shops previously using various types of machinery, all would further weigh against the Respondent's assertion.

The Respondent's third reason for terminating Clayton was that it failed to receive any of the substantial jobs it had bid on in the beginning of 2001, and "there was not enough work to justify the continued employment of Clayton." However, the record evidence does not support the Respondent's contention. At the time of Clayton's discharge the Respondent appears to have had a lot of work and employees were working overtime. In fact, the Respondent had asked Clayton to work overtime on the Saturday before he was discharged. Further, Plant Manager Colandrea testified that overtime requirements did not decease in mid-May. Colandrea testified that things slowed down "a little" in July but overtime was not even eliminated then.

Moreover, with regard to the bided work, Autovino admitted that he did not expect to be awarded all of the work, the bids being for approximately $1.4 million, $1.25 million, and $262,000.[35] While Respondent received none of this work directly, however, Autovino testified that his brother's company was awarded the largest of these projects and had to subcontract about half the work to the Respondent since that company was unable to perform all the work itself. Importantly, there was no evidence presented that the Respondent was advised that it would not be awarded these jobs prior to the date of Clayton's discharge. The Respondent failed to demonstrate that its business had changed during the period of Clayton's employment sufficient to show that there was not enough work to justify the continued employment of Clayton.[36]

From all of the above, I find and conclude that by discharging its employee Walter E. Clayton Jr. because of his union activities the Respondent violated Section 8(a)(1) and (3) of the Act.[37]

1. Meetings with employees

The consolidated complaint alleges that in mid-May 2001, the Respondent, by Joseph Autovino, during a meeting with employees at its Staten Island facility: created the impression

[30] *Caques Asphalt*, 296 NLRB 785 (1989).

[31] When Clayton was discharged, Autovino told him that while his work was very good, the Respondent did not have work for him because it had failed to receive work it had bid for and counted on getting and that he would be recalled when things picked up.

[32] Clayton explained that he did not consider returning to work later in the day because "for me to come from my son's school back to Staten Island (the Respondent's facility), I would never have made it in time."

[33] The Respondent in its brief points to Clayton's testimony that when he asked Colandrea for the time off, Colandrea responded either, "Oh, I understand, I have kids" or "Don't worry about it. We all have kids." Colandrea stated that he has no children. The Respondent asserts that this indicates that Clayton possibly "fabricated" his account of their conversation. The Respondent continues, "It is respectfully submitted that an employee, who fails to call or show, after only six days of employment, is rightfully discharged for cause." However, this was not the circumstance present in this case.

[34] See fn. 17 herein.

[35] The extent of these contracts would be extraordinary for a company who typically performs jobs in the under $10,000 category, and Autovino admitted that he would have to turn down at least one of the projects if awarded all of them due to the volume of work. It is disingenuous to argue that the Respondent expected to be awarded this work and it had only hired one additional carpenter at $16 an hour to prepare itself for these million dollar extensive projects.

[36] I am aware that Clayton was the last employee hired by the Respondent at the time of his discharge and that the Respondent hired no other employee after its decision to terminate him. However, this is not sufficient to support the Respondent's contention that it would have "exercised its legitimate business decision to terminate Clayton even in the absence of any alleged protected conduct."

[37] *Wright Line*, supra; *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). Also see *Active Transportation*, 296 NLRB 431 (1989).

among its employees that their union activities were under surveillance by the Respondent; threatened its employees with unspecified reprisals if they joined, supported, or assisted the Union; directed its employees to refrain from speaking with an agent of the Union; and made an implied warning to its employees that they would be laid off if they joined, supported, or assisted the Union, in violation of Section 8(a)(1) of the Act. The Respondent denies these allegations.

The test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement that his union activities had been placed under surveillance. The basis for such violation is that employees should be free to engage in union organizing campaigns without the fear that management is watching them. An employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee's union involvement. *Flexsteel Industries*, 311 NLRB 257 (1993).

The evidence shows that after Clayton's discharge on May 16, 2001, the Respondent held at least two and possibly three meetings with all its employees except office personnel, between May 20 and 23 or 24. Autovino testified that some employees had approached him wanting to talk to him and his realization that "obviously there is something going on" led him to hold "a meeting with everyone rather than have an individual contact." Dauchand testified uncontradictedly that the Respondent had never held such meetings before while he worked there. Dauchand also credibly testified that at the first meeting there was "talk about the union," and Autovino told the employees to "think twice about joining the union. . . . Because the company isn't competitive." Autovino's statement to the employees created the impression that their union activities were under surveillance.[38] Autovino's statement also constitutes an unlawful threat of unspecified reprisal if employees joined the Union.

Moreover, at the second meeting with employees, Autovino told them that he had seen Clayton, known by Autovino at least as a union supporter, outside the shop and that they should not speak to him. Autovino also impliedly warned the employees that they would be laid off if they joined the Union when he told them that if the Union got in and started to make demands, the Respondent would be unable to compete with its competitors.

By the above conduct the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.[39]

2. Other violations

The consolidated complaint alleges that the Respondent violated Section 8(a)(1) and (3) by granting its employees additional benefits, including vacation and medical benefits in order to discourage its employees from joining, supporting, or assisting the Union. The Respondent denies this allegation.

While not alleged as a violation in the consolidated complaint the evidence in the record clearly establishes that the Respondent solicited its employees' grievances, implied that it would remedy them and then did so. In *Valley Community Services*, 314 NLRB 903, 904 (1994), the Board stated:

> When an employer, who has not previously had a practice of soliciting employee grievances or complaints, suddenly embarks on such a course during an organizational campaign, the Board may find that the employer is implicitly promising to correct those inequities discovered as a result of the inquiries, thereby leading employees to believe that the combined program of inquiry and correction will make collective action unnecessary.

In the instant case, Autovino at the employee meetings asked employees what their problems and grievances were, whereupon employees raised issues about vacation and medical benefits. Autovino said he would look into this and get back to the employees. At the meeting on May 23, as Autovino testified, "[B]asically, I conceded. I agreed with what they wanted." The Respondent then unlawfully granted its employees additional vacation and medical benefits with Autovino telling the employees, "Do you all agree now it's a good policy, and you don't have to go to the Union." These benefits were granted by the Respondent after it solicited grievances from its employees in response to the Union's campaign. The Respondent offered no explanation with respect to the timing of the implementation of these benefits nor did it offer a legitimate reason for the changes.

I therefore find and conclude that the Respondent violated Section 8(a)(1) and (3) by unlawfully granting vacation and medical benefits in order to discourage membership in the Union.[40]

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operation of the Respondent described in section 1, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

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[38] *Acme Bus Corp*., 320 NLRB 458 (1995). Autovino testified that he had told the employees "just be careful what you are getting into. Make the right decision."

[39] *Daikichi Sushi*, 335 NLRB 622 (8/2001); also see *AP Automotive Systems*, 333 LRB 581 (2001); *Hertzka & Knowles*, 206 NLRB 191, 194 (1973). *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Textile Workers v. Darlington Mfg. Co*., 380 U.S. 263, 274 (1965).

[40] *Wintex Knitting Mills, Inc*., 216 NLRB 1058 (1975). It should be remembered that Autovino had also told the employees during these meetings that they should be careful about getting into the Union and to make the right decision while he agreed to consider their complaints and then corrected them.

Having found that the Respondent unlawfully discharged Walter E. Clayton Jr. the Respondent shall be ordered to offer him immediate reinstatement to his former position, discharging if necessary any replacements hired since his termination and that he be made whole for any loss of earnings or other benefits by reason of the discrimination against him in accordance with the Board's decision in *F. W. Woolworth Co.*, 90 NLRB 289 (1980), with interest computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp.*, 231 LRB 651 (1977), and *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Because of the nature of the unfair labor practices found here, and in order to make effective the interdependent guarantees of Section 7 of the Act, I recommend that the Respondent be ordered to refrain from in any like or related manner abridging any of the rights guaranteed employees by Section 7 of the Act. The Respondent should also be required to post the customary notice.

CONCLUSIONS OF LAW

1. Enjo Contracting Co., Inc. d/b/a Enjo Architectural Millwork is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, Joseph Autovino has held the position of president of the Respondent and has been an agent of the Respondent acting on its behalf.

4. By unlawfully discharging Walter E. Clayton Jr. and failing and refusing to reinstate him the Respondent has violated Section 8(a)(1) and (3) of the Act.

5. By granting its employees additional benefits, including vacation and medical benefits in order to discourage its employees from joining, supporting, or assisting the Union, the Respondent violated Section 8(a)(1) and (3) of the Act.

6. By unlawfully interrogating a job applicant about his union membership, activities, and sympathies the Respondent has violated Section 8(a)(1) of the Act.

7. By unlawfully directing a job applicant to refrain from discussing the Union with other employees the Respondent violated Section 8(a)(1) of the Act.

8. By unlawfully creating the impression among its employees that their union activities were under surveillance by the Respondent, the Respondent violated Section 8(a)(1) of the Act.

9. By unlawfully threatening its employees with unspecified reprisals if they joined, supported, or assisted the Union the Respondent violated Section 8(a)(1) of the Act.

10. By unlawfully directing its employees to refrain from speaking to an agent of the Union the Respondent violated Section 8(a)(1) of the Act.

11. By unlawfully making an implied warning to its employees that they would be laid off if they joined, supported, or assisted the Union, the Respondent violated Section 8(a)(1) of the Act.

12. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[41]

ORDER

The Respondent, Enjo Contracting Co., Inc. d/b/a Enjo Architectural Millwork, Staten Island, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging Walter E. Clayton Jr. and failing and refusing to reinstate him because of his activities on behalf of the Union.

(b) Granting its employees additional benefits, including vacation and medical benefits in order to discourage its employees from joining, supporting, or assisting the Union, provided that the Respondent is not required to withdraw, vary, or abandon these benefits already granted to the employees.

(c) Interrogating job applicants about their union membership, activities, and sympathies, and directing job applicants to refrain from discussing the Union with other employees.

(d) Creating the impression among its employees that their union activities are under surveillance by the Respondent.

(e) Threatening its employees with unspecified reprisals if they joined, supported, or assisted the Union.

(f) Directing its employees to refrain from speaking to an agent of the Union.

(g) Impliedly warning its employees that they would be laid off if they joined, supported, or assisted the Union.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Walter E. Clayton Jr. full reinstatement to his former position, of if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Clayton whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against him in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Walter E. Clayton Jr. and within 3 days thereafter notify him in writing that this has been done and that this unlawful action will not be used against him in any way.

(d) Preserve, and within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records social security payment records, timecards, personnel records and reports, and all other records including an electric copy of the records if stored in electronic form, necessary to analyze the amount of backpay under the terms of this Order.

[41] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Within 14 days after service by the Region, post at its facility in Staten Island, New York, copies of the attached notice marked "Appendix."[42] Copies of the notice, on forms provided by the Regional Director for Region 29 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 22, 2001.

(f) Within 14 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 15, 2002

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge and fail and refuse to reinstate employees because they joined, supported, or assisted the Union and in order to discourage employees from engaging in such activities, or other concerted activities.

WE WILL NOT grant employees additional benefits, including vacation and medical benefits in order to discourage employees from joining, supporting, or assisting the Union, provided that the Respondent shall not be required to withdraw those benefits already granted the employees.

WE WILL NOT coercively interrogate job applicants about their union membership, activities, and sympathies.

WE WILL NOT direct job applicants to refrain from discussing the Union with other employees.

WE WILL NOT create the impression among our employees that their union activities are under surveillance.

WE WILL NOT threaten our employees with unspecified reprisals if they joined, supported, or assisted the Union.

WE WILL NOT direct our employees to refrain from speaking to an agent of the Union.

WE WILL NOT impliedly warn our employees that they would be laid off if they joined, supported, or assisted the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Walter E. Clayton Jr. full reinstatement to his former job, or if this position no longer exists, to substantially equivalent positions, without prejudice to seniority or any other rights or privileges he previously enjoyed.

WE WILL make Walter E. Clayton Jr. whole for any loss of earnings and other benefits resulting from the unlawful discrimination against him, less interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Walter E. Clayton Jr., and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that his discharge will not be used against him in any way.

ENJO CONTRACTING CO., INC. D/B/A ENJO ARCHITECTURAL MILLWORK

[42] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."